NEW MEXICO LAW REVIEW

Volume 27
Issue 3 *Summer 1997*

Summer 1997

Tort Law - Comparative Fault Eliminates the Need for Indemnification between Concurrent Tortfeasors: Otero v. Jordan Restaurant Enterprises

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TORT LAW—Comparative Fault Eliminates the Need for Indemnification Between Concurrent Tortfeasors: *Otero v. Jordan Restaurant Enterprises*

I. INTRODUCTION

In *Otero v. Jordan Restaurant Enterprises*,[1] the New Mexico Supreme Court addressed whether an independent contractor hired by a landowner should be allowed to reduce his liability to an injured plaintiff by comparing the fault of a concurrent tortfeasor.[2] The *Otero* court affirmed the trial court's refusal of a jury instruction on comparative fault when the independent contractor hired by the landowner made a "tacit representation" that he was properly licensed to the concurrent tortfeasor, the City of Albuquerque.[3] Contrary to one line of New Mexico precedent, the New Mexico Supreme Court concluded that the defendant landowner was vicariously liable to the plaintiff, an invitee, for the injury that resulted from the unsafe condition on the defendant landowner's premises.[4] The unsafe condition was created by the conduct of an independent contractor hired by the landowner. Furthermore, the supreme court held that the defendant landowner, in determining its liability to the plaintiff, was barred from comparing the fault of a negligent concurrent tortfeasor.[5] However, the court also found that the landowner was not liable to indemnify the concurrent tortfeasor for the independent contractor's intentionally tortious conduct.[6]

The *Otero* decision may allow plaintiffs to avoid comparing the fault of immune or insolvent concurrent tortfeasors and thus recover one hundred percent of their damages from their chosen defendant. Moreover, after *Otero*, defendants may be able to avoid indemnifying concurrent tortfeasors and to seek indemnification from individuals for whom they are held vicariously liable. Thus, it appears that *Otero* broadens vicarious liability for an intentional tortfeasor beyond the case's narrow holding. Conversely, *Otero* seems to narrow the possibility that a landowner will be held directly and strictly[7] liable for failing to take precautions against unsafe conditions on her premises.

This Note first presents the contextual background of pure comparative negligence, several liability, vicarious liability, and proportional indemnification in New Mexico. It then analyzes the reasoning of the supreme court in *Otero*. It

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1. 122 N.M. 187, 922 P.2d 569 (1996).

2. *See id.* at 192, 922 P.2d at 574. This Note discusses concurrent tortfeasors. For a discussion of successive tortfeasors, see Brady Pofahl, *Original and Successive Tortfeasors and Release Documents in New Mexico Tort Law:* Lujan v. Healthsouth Rehabilitation Corporation, 27 N.M. L. REV. 697 (1997); *see also Otero*, 122 N.M. at 191 n.5, 922 P.2d at 573 n.5 (discussing Lujan v. Healthsouth Rehabilitation Corp., 120 N.M. 422, 902 P.2d 1025 (1995), and the successive tortfeasor situation).

3. *See Otero*, 122 N.M. at 188, 922 P.2d at. 570

4. *See id.* at 193, 922 P.2d at 575 ("[The defendant] has a landowner's duty that imposes vicarious liability to invitees injured by an unsafe condition on the premises.")

5. *See id.* at 191, 922 P.2d at 573 (The defendant, as the owner of unsafe premises, was vicariously responsible to the plaintiff.).

6. *See id.* (The defendant landowner did not stand in its independent contractor's shoes for the purpose of determining liability to indemnify the City of Albuquerque (City), a concurrent negligent tortfeasor).

7. See Saiz v. Belen Sch. Dist., 113 N.M. 387, 391, 827 P.2d 102, 106 (1992) (holding the defendant directly responsible, under strict liability, for injuries caused by the absence of precautions in the face of peculiar risks of harm).

concludes by discussing the implications of the *Otero* decision on New Mexico tort law.

II. FACTS AND PROCEDURAL HISTORY

Jordan Restaurant Enterprises (Jordan) operated a sports bar and grill in Albuquerque, New Mexico.[8] In July 1989, Jordan entered into a contract with Gary Marquart (Marquart), an independent contractor, to make improvements to Jordan's sports bar.[9] Marquart was responsible for all architectural services, construction services, and design services for the Jordan expansion project.[10] The improvements included the installation of bleachers to be used by Jordan's patrons while watching sporting events on a big screen television.[11] Marquart hired an independent architect to draw the bleacher design.[12]

"After the bleachers had been installed, employees of Jordan [used] the bleachers and observed no structural weaknesses."[13] Nevertheless, approximately four months after the improvements were completed, the bleachers collapsed.[14] When the bleachers collapsed, a patron of Jordan's, John Otero (Otero), fell and injured his back.[15] Evidence later disclosed that the project architect had failed to provide specifications for the bleachers.[16] In addition, the City of Albuquerque (City) had issued the building permit to Marquart even though he was not properly licensed to perform renovations on commercial premises.[17]

Otero sued Jordan and Marquart for the personal injuries that he suffered.[18] He filed a motion for partial summary judgment on the issue of liability.[19] The district court granted Otero's motion for partial summary judgment and held Jordan and

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8. *See Otero*, 122 N.M. at 188, 922 P.2d at 570.

9. *See id.*

10. *See* Defendant's Brief in Chief at 2, Otero v. Jordan Restaurant Enters., 122 N.M. 187, 922 P.2d 569 (1996) (No. 22-841).

11. *See Otero*, 122 N.M. at 188-89, 922 P.2d at 570-71.

12. *See* Defendant's Brief at 4, *Otero* (No. 22-841) (The plans were prepared and stamped by an architect retained by Marquart.).

13. *Otero*, 122 N.M. at 189, 922 P.2d at 571.

14. *See* Defendant's Brief at 4, *Otero* (No. 22-841); *see also Otero*, 122 N.M. at 189, 922 P.2d at 571. Defendant Jordan conceded that the bleachers were negligently installed by Marquart. *See* Defendant's Brief at 3, *Otero* (No. 22-841); *see also Otero*, 122 N.M. at 189, 922 P.2d at 571. The metal supports on the bleachers were fastened in a vertical position despite the fact that the manufacturer's assembly instructions called for metal cross-bracing to be installed in a "X" fashion. *See Otero*, 122 N.M. at 189, 922 P.2d at 571.

15. Otero was seated on the top row of the bleacher assembly and fell, along with twenty-five other spectators who had purchased a ticket to view a closed circuit showing of a boxing match. *See* Appellee's Answer Brief in Chief at 1, Otero v. Jordan Restaurant Enters., 122 N.M. 187, 922 P.2d 569 (1996) (No. 15-232).

16. The architect noted the location of the bleachers on the plans, but failed to set out any direction, specifications, or special requirements on the plans. *See* Defendant's Brief at 4, *Otero* (No. 22-841).

17. The City's permit department usually checks a contractor's license when a contractor applies for a building permit. In this particular instance, the building permit was issued by the City for the construction project without ascertaining whether Marquart was properly licensed. *See id.*

18. *See Otero*, 122 N.M. at 188, 922 P.2d at 570; Judgment of July 15, 1992 at 1, Otero v. Jordan, 122 N.M. 187, 922 P.2d 569 (1996) (No. CV-90-1949); *see also infra* note 19.

19. *See* Judgment of July 15, 1992 at 2, *Otero* (No. CV-90-1949). After the Judgment of July 15, 1992, defendant Marquart no longer was a party in the action nor in the appeal to the supreme court. *See generally Otero*, 122 N.M. at 188, 922 P.2d at 570. Marquart did not appear at the hearing for Jordan's Motion for Partial Summary Judgment on Liability against Jordan and Marquart, *see* Judgment of July 15, 1992, at 2, *Otero* (No. CV-90-1949), and did not appeal the Order granting partial summary judgment on liability and the Verdict imposing liability, as a matter of law, on Jordan for Marquart's acts, *see* Defendant's Brief in Chief at 1, *Otero* (No. 22-841).

Marquart jointly and severally liable,[20] basing its decision on *Broome v. Byrd*,[21] a New Mexico Court of Appeals' decision.[22] When the issue of damages was presented to the jury, Jordan requested that the district court allow the jury to compare Marquart's fault with that of the architect and the City.[23] The district court refused the requested jury instruction.[24] The jury returned a verdict in favor of Otero for $47,000 against defendants Jordan and Marquart jointly and severally.[25]

Jordan appealed the verdict, arguing that the district court had erroneously entered summary judgment on the issue of Jordan's liability for Marquart's acts.[26] Jordan also argued that the court erred by not instructing the jury on comparative fault.[27] On review, the New Mexico Court of Appeals adopted section 422(b) of the *Restatement (Second) of Torts*.[28] It found Jordan liable to Otero to the same extent that Marquart and the architect would have been liable.[29] Additionally, the court of appeals held that it was not error to refuse Jordan's requested instruction requiring the jury to compare the fault of the City for the purpose of reducing the liability of Jordan.[30] The court of appeals concluded that, if Otero had sued the City, the City would have been entitled to indemnification from Jordan for any damage award against it.[31] It reasoned that Jordan's liability arose from Jordan's failure to take reasonable precautions to protect Otero from the risk of harm.[32] Thus, the court of appeals held Jordan directly liable for any risk of harm caused by Marquart.[33]

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20. *See* Judgment of July 15, 1992 at 2, *Otero* (No. CV-90-1949).

21. 113 N.M. 38, 822 P.2d 677 (Ct. App. 1991).

22. *See* Judgment of July 15, 1992 at 2, *Otero* (No. CV-90-1949); *see also* Otero v. Jordan Restaurant Enters., 119 N.M. 721, 722, 895 P.2d 243, 244 (Ct. App. 1995), *rev'd on other grounds*, 122 N.M. 187, 922 P.2d 569 (1996).

23. Jordan argued that the jury should be allowed to consider the negligence of all of the participants whose acts or conduct led to Otero's injuries. *See* Appellant's Brief in Chief at 12, Otero v. Jordan Restaurant Enters., 119 N.M. 721, 895 P.2d 243 (Ct. App. 1995) (No. 22-841).

24. *See Otero*, 122 N.M. at 189, 922 P.2d at 571.

25. *See id.*; *see also* Judgment of July 15, 1992 at 3, *Otero* (No. CV-90-1949).

26. *See* Appellant's Brief at 6, *Otero* (No. 15-232).

27. *See id.* at 12.

28. Section 422 of the RESTATEMENT (SECOND) OF TORTS states in part:

> A possessor of land who entrusts to an independent contractor construction, repair, or other work on the land, or on a building or other structure upon it, is subject to the same liability as though he had retained the work in his own hands to others on or outside of the land for physical harm caused to them by the unsafe condition of the structure
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> . . .
>
> (b) after he has resumed possession of the land upon its completion.

RESTATEMENT (SECOND) OF TORTS § 422 (1965).

In *Broome v. Byrd*, the court of appeals adopted section 422(a) of the RESTATEMENT (SECOND) OF TORTS, holding that a commercial building owner can be vicariously liable for its independent contractor's negligence "where the negligence created a dangerous condition causing injury to a business visitor in those areas of the building over which the owner retained control." Otero v. Jordan Restaurant Enters., 119 N.M. 721, 723, 895 P.2d 243, 245 (Ct. App. 1995) (citing Broome v. Byrd, 113 N.M. 38, 41, 822 P.2d 677, 680 (Ct. App. 1991)), *rev'd on other grounds*, 122 N.M. 187, 922 P.2d 569 (1996).

29. *See Otero*, 119 N.M. at 723-25, 895 P.2d at 245-47. The RESTATEMENT (SECOND) OF TORTS holds a possessor of land to the same liability as a hired contractor—as if the landowner had retained the work in his own hands "after he has resumed possession of the land upon its completion." RESTATEMENT (SECOND) OF TORTS § 422(b) (1965).

30. *See Otero*, 119 N.M. at 725, 895 P.2d at 247.

31. *See id.* at 726, 895 P.2d at 248.

32. *See id.* at 725, 895 P.2d at 247.

33. *See id.* (Jordan had a nondelegable duty to exercise reasonable care to ensure that the bleachers were in a safe condition for visitors such as Otero).

The New Mexico Supreme Court initially denied certiorari[34] and Jordan filed a Motion for Reconsideration.[35] Jordan argued in its Motion that the court of appeals' reference in *Otero* to a footnote in the supreme court's *Amrep Southwest, Inc. v. Shollenbarger Wood Treating, Inc.*[36] opinion did not cite New Mexico authority.[37] Jordan further argued that the court of appeals reliance on that footnote was in conflict with the supreme court's statement that "'[it had] already created a system in which each concurrent tortfeasor is liable only for the percentage of damages that is attributable to his or her fault.'"[38]

The New Mexico Supreme Court subsequently granted certiorari for the limited purpose of considering whether the City would have been entitled to indemnification from Jordan and if so, the effect it would have on comparative fault.[39] The supreme court overruled the court of appeals' holding that the City was entitled to indemnification from Jordan.[40] Nonetheless, the supreme court affirmed the trial court's denial of a jury instruction on comparative fault.[41]

III. HISTORICAL AND CONTEXTUAL BACKGROUND

A. *The Adoption of the Pure Comparative Negligence Doctrine*

In *Scott v. Rizzo*,[42] the New Mexico Supreme Court replaced the long adhered-to rule of contributory negligence[43] by judicially adopting the doctrine of pure comparative negligence.[44] Comparative negligence replaced the "all-or-nothing" standard of contributory negligence.[45] The judicial adoption of comparative negligence eliminated the inequity and injustice found under the previous doctrine of contributory negligence where the entire loss was cast upon a plaintiff whose own negligence contributed to his injury.[46] The court noted that liability based on fault is

34. *See* Otero v. Jordan Restaurant Enters., 119 N.M. 617, 894 P.2d 394 (1995).

35. *See generally* Motion for Reconsideration of Defendant-Appellant Petition for Writ of Certiorari, Otero v. Jordan Restaurant Enters., 119 N.M. 810, 896 P.2d 490 (May 25, 1995) (No. 22-841).

36. 119 N.M. 542, 893 P.2d 438 (1995).

37. *See* Motion for Reconsideration of Defendant-Appellant's Petition for Writ of Certiorari at 2, 119 N.M. 810, 896 P.2d 490 (May 25, 1995) (No. 22-841) (citing Otero v. Jordan Restaurant Enters., 119 N.M. 721, 726, 895 P.2d 243, 248 (Ct. App. 1995)).

38. *See id.* (quoting *Amrep*, 119 N.M. at 552, 893 P.2d at 448).

39. *See Otero*, 122 N.M. 187, 922 P.2d 569 (1996).

40. *See id.* at 193, 922 P.2d at 575.

41. *See id.*

42. 96 N.M. 682, 634 P.2d 1234 (1981). The supreme court consolidated *Scott* with *Claymore v. City of Albuquerque, aff'd sub nom.*, Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981), and adopted the court of appeals' *Claymore* opinion. *See Scott*, 96 N.M. 682, 634 P.2d 1234; *see also* Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App. 1982).

43. The supreme court recognized that the adoption of comparative negligence "mark[ed] a significant change in the law of negligence," but felt that the adoption would "improve the administration of justice." *Scott*, 96 N.M. at 683, 634 P.2d at 1235. The court further stated "that long-term adherence to [the] rule [of contributory negligence did] not, by itself, justify its continuance if justice demand[ed] its abolition." *Id.*

44. *See id.* at 684, 634 P.2d at 1236. In finding "that the 'pure' form [of comparative negligence] is superior and preferable to other comparative systems," the supreme court in *Scott* followed the United States Supreme Court. *Id.* at 689, 634 P.2d at 1241 (citing United States v. Reliable Transfer Co., Inc., 421 U.S. 397 (1975)).

45. *See id.*

46. *See id.*

the cornerstone of tort law.[47] Furthermore, a system such as contributory negligence does not serve any principle of fault liability because it permits some wrongdoers to avoid all liability.[48]

Under pure comparative negligence, the plaintiff's percentage of contributing fault will reduce the recovery of total damages in an amount equal to her degree of fault, while at the same time exposing the defendant to liability as a result of her own fault.[49] The *Scott* court noted that the pure form of comparative negligence has three benefits: (1) it denies recovery for one's fault; (2) it permits recovery to the extent of another's fault; and (3) it holds parties responsible to the degree that they have caused harm.[50] Thus, as a general rule, New Mexico applies the pure comparative negligence doctrine to concurrent tortfeasors and holds each party severally liable for their percentage of attributable fault.

However, there are some circumstances where New Mexico bars the application of the pure comparative negligence doctrine. For example, intentional misconduct bars the application of the pure comparative negligence doctrine. This is because intentional tortfeasors, as a matter of law, are jointly and severally liable for the harm they have caused rather than severally liable for a percentage of attributable fault.[51]

In *Sauter v. St. Michael's College*,[52] the New Mexico Supreme Court held that fraudulent tortfeasors would not be allowed, by operation of law, to profit from their own fraud.[53] The *Sauter* court based its decision to deny one guilty of fraud the opportunity to profit from that wrong on fundamental principles of equity.[54] Additionally, the New Mexico Supreme Court held in *Gouveia v. Citicorp Person to Person Financial Center, Inc.*[55] that, under some circumstances, the mere failure to disclose facts may be a fraudulent misrepresentation.[56]

Most recently, in *Reichert v. Atler*,[57] the New Mexico Supreme Court ruled that a party who commits an intentional tort should not be entitled to escape full

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47. *See id.*

48. *See id.*

49. *See id.* The pure form of comparative fault requires wrongdoers to share the costs at a ratio of their respective wrongdoing and more fairly apportions the burden of fault than the modified system of comparative fault. *See id.* This is because the modified comparative fault system allows a 49% negligent plaintiff to recover 51% of his damages, but denies any recovery to a plaintiff who is found to be at least 50% negligent. *See id.*

50. *See id.* ("The pure form will not permit unjust enrichment of either party.").

51. *See* N.M. STAT. ANN. § 41-3A-1(C)(1) (Repl. Pamp. 1996) (New Mexico Several Liability Act). Section 41-3A-1(C) reads in part:

> The doctrine imposing joint and several liability shall apply:
>
> (1) to any person or persons who acted with the intention of inflicting injury or damage . . . .

Id.

52. 70 N.M. 380, 374 P.2d 134 (1962).

53. *See id.* at 388-89, 374 P.2d at 140-41. As the *Sauter* court stated: "[I]t is a fundamental principle of equity that no one can take advantage of [their] own wrong." *Id.* at 388, 374 P.2d at 140 (citing Honk v. Karlsson, 292 P.2d 455 (Ariz. 1956)).

54. *See id.* at 389, 374 P.2d at 140; *see also* Cruise v. Graham, 622 So.2d 37, 40 (Fla. Dist. Ct. App. 1993) (denial of comparative fault instruction in fraud action not error); Tratchel v. Essex Group Inc., 452 N.W.2d 171, 180-81 (Iowa 1990) (instruction on comparative fault properly denied to defendant guilty of fraud); Neff v. Bud Lewis Co., 89 N.M. 145, 149, 548 P.2d 107, 111 (Ct. App. 1976) (the doctrine of negligent misrepresentation does not afford a defense of contributory negligence); Estate of Braswell v. People's Credit Union, 602 A.2d 510, 512-14, 515 (R.I. 1992) (comparative negligence principles are inapplicable in action for negligent misrepresentation).

55. 101 N.M. 572, 686 P.2d 262 (1984).

56. *See id.* at 576, 686 P.2d at 266.

57. 117 N.M. 623, 875 P.2d 379 (1994).

responsibility by comparing his intentional wrongdoing with that of a negligent concurrent tortfeasor.[58] As a result, New Mexico denies application of the pure comparative negligence doctrine when a defendant is guilty of the intentional failure to disclose certain facts or the intentional tort of fraud.[59] Thus, the mere failure to disclose certain facts may bar a jury instruction on comparative negligence in New Mexico.

B. Liability of Concurrent Tortfeasors in New Mexico

New Mexico has followed the general rule of holding concurrent tortfeasors severally liable, retaining only four limited exceptions when joint and several liability may apply. The doctrine of several liability was judicially adopted in *Bartlett v. New Mexico Welding Supply, Inc.*[60] Shortly thereafter, the New Mexico Legislature adopted the doctrine of several liability with statutorily retained exceptions.[61]

1. The Adoption of Several Liability as the General Rule in New Mexico

Prior to the adoption of pure comparative negligence in *Scott v. Rizzo*,[62] New Mexico followed the common law rule of joint and several liability.[63] In *Bartlett*, the New Mexico Court of Appeals abolished joint and several liability under New Mexico's pure comparative negligence system.[64] The *Bartlett* court addressed whether the defendant in the case at bar could be held liable for the entire damage caused by the negligence of the defendant and the negligence of an unknown concurrent tortfeasor in an automobile accident.[65] Under the common law rule of joint and several liability, either defendant in the automobile accident could have been held one hundred percent liable for the damage caused by the defendants' combined negligence.[66] The specific issue in *Bartlett* was whether a defendant who

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58. *See id.* at 625, 875 P.2d at 381. The *Reichert* court stated that public policy supports allowing a negligent bar owner to reduce his liability by the percentage of fault attributable to the intentional shooting of an off-duty employee by a patron on the premises. *See id.* The *Reichert* court further stated that such an analysis was consistent with the adoption of comparative fault in *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981), and the rejection of joint and several liability in comparative fault in *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (Ct. App. 1982). *See Reichert*, 117 N.M. at 625, 875 P.2d at 381.

59. *See Reichert*, 117 N.M. 623, 875 P.2d 379; *Sauter*, 70 N.M. 380, 374 P.2d 134. New Mexico is not the only state to deny comparative fault jury instructions when the defendant is guilty of fraud. *See, e.g., Cruise*, 622 So.2d at 40 (Florida); *Tratchel*, 452 N.W.2d at 180-81 (Iowa).

60. 98 N.M. 152, 646 P.2d 579 (Ct. App. 1982).

61. *See* N.M. STAT. ANN. § 41-3A-1 (Repl. Pamp. 1996). Section 41-3A-1 reads in part:

> A. In any cause of action to which the doctrine of comparative fault applies, the doctrine imposing joint and several liability upon two or more wrongdoers whose conduct proximately caused an injury to any plaintiff is abolished except as otherwise provided hereafter.

Id.; *see* Andrew G. Schultz & M.E. Occhialino, *Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History*, 18 N.M. L. REV. 483 (1988). For the description of the four statutory exceptions to several liability, see *infra* note 74.

62. 96 N.M. 682, 683, 634 P.2d 1234, 1235 (1981).

63. *See Bartlett*, 98 N.M. at 154, 646 P.2d at 581.

64. *See id.* at 158, 646 P.2d at 585. The *Bartlett* court abolished joint and several liability for negligent concurrent tortfeasors based on fundamental notions of fairness. *See id.* at 158-59, 646 P.2d at 585-86.

65. *See id.*

66. *See id.*

was only thirty percent at fault, while another tortfeasor was seventy percent at fault, still would be held responsible for paying one hundred percent of the damages.[67]

In *Bartlett*, the New Mexico Court of Appeals refused to retain joint and several liability under New Mexico's pure comparative negligence system.[68] The *Bartlett* court, relying on *Scott v. Rizzo*, reasoned that "[t]he concept of one indivisible wrong, based on common law technicalities, [was] obsolete, and [was] not to be applied in comparative negligence cases . . . ."[69] The *Bartlett* court refused to impose full liability on all defendants through joint and several liability simply to protect a plaintiff from an unknown or insolvent concurrent tortfeasor.[70] Thus, under *Bartlett*, the plaintiff bears the risk of an immune or insolvent concurrent tortfeasor.[71] In abolishing joint and several liability for concurrent tortfeasors, the *Bartlett* court established that the liability of a defendant would be predicated upon relative blameworthiness rather than the unavailability or insolvency of concurrent tortfeasors.[72]

2. Exceptions to the General Rule of Several Liability

After *Bartlett*, as previously indicated, the New Mexico Legislature adopted the doctrine of several liability for concurrent tortfeasors with four statutorily retained exceptions.[73] The legislature recognized the continued application of joint and several liability to: (1) persons acting with intent to harm; (2) persons found vicariously liable for the acts of another; (3) persons found strictly liable for a defective product; or (4) situations having a sound basis in public policy.[74] Thus, although several liability is the general rule in New Mexico for concurrent tortfeasors, joint and several liability continues to apply in certain limited circumstances.

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67. *See id.* at 153, 646 P.2d at 580.

68. *See id.* at 158, 646 P.2d at 585. *But cf.* Arctic Structures, Inc. v. Wedmore, 605 P.2d 426 (Alaska 1979) (retaining joint and several liability for concurrent tortfeasors); American Motorcycle Ass'n v. Superior Court, 578 P.2d 899 (Cal. 1978) (retaining joint and several liability in order to allow an injured plaintiff to collect damages awarded); Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975) (the Uniform Contribution Among Joint Tortfeasors Act retains full joint and several liability); Weeks v. Felter, 297 N.W.2d 678 (Mich. Ct. App. 1980) (doctrine of comparative negligence does not mandate abandonment of joint and several liability).

69. *Bartlett*, 98 N.M. at 158, 646 P.2d at 585 (citing *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981)); *see Scott*, 96 N.M. at 687, 634 P.2d at 1239.

70. *See Bartlett*, 98 N.M. at 158-59, 646 P.2d at 585-86.

71. *See id.*

72. *See id.* Under the doctrine of comparative negligence damages are to be apportioned on the basis of fault. As a result, the *Bartlett* court reasoned that liability also must be apportioned on the basis of fault. *See id.* at 159, 646 P.2d at 586. Several liability also enables concurrent tortfeasors to pay for the damages that they have caused, rather than being held 100 percent liable for the damages under joint and several liability. *See id.*

73. *See* N.M. STAT. ANN. § 41-3A-1 (Repl. Pamp. 1996).

74. *See id.* Section 41-3A-1(C) provides in pertinent part:

> The doctrine imposing joint and several liability shall apply:
>
> (1) to any person or persons who acted with the intention of inflicting injury or damage;
>
> (2) to any persons whose relationship to each other would make one person vicariously liable for the acts of the other, but only to that portion of the total liability attributed to those persons;
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> (3) to any persons strictly liable for the manufacture and sale of a defective product, but only to that portion of the total liability attributed to those persons; or
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> (4) to situations not covered by any of the foregoing and having sound basis in public policy.

Id.

a. The Doctrine of Vicarious Liability in New Mexico

The general principle of liability for an employer/landowner is that an employer is not liable for the negligence of a hired contractor.[75] However, this rule is subject to numerous exceptions.[76] Indeed, the exceptions are so numerous that the general rule seems unlikely to be applied in most cases.[77] With the New Mexico Several Liability Act, New Mexico legislatively has applied joint and several liability to vicarious liability cases.[78] Thus, one who employs an independent contractor to perform work which creates a particular risk of harm to others is subject to vicarious liability for failure to exercise reasonable care, unless special precautions are taken.[79] Hence, a employer/landowner may be held liable for the negligent failure of a contractor to put structures on the property in a reasonably safe condition.[80]

In *Broome v. Byrd*,[81] the New Mexico Court of Appeals adopted section 422(a) of the *Restatement (Second) of Torts*[82] and held the defendant landowner vicariously liable for his independent contractor's negligence.[83] Section 422(a) pertains to the liability of the landowner for harm caused by his independent contractor's negligence while the work is in progress.[84] The *Broome* court found no basis for allowing a commercial building owner to avoid the duty to safely maintain his premises for business visitors merely because he chose to hire an independent contractor to perform the construction work for him.[85] Thus, the *Broome* Court held the landowner

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75. *See* Otero v. Jordan Restaurant Enters., 119 N.M. 721, 723, 895 P.2d 243, 245 (Ct. App. 1995) (citing Broome v. Byrd, 113 N.M. 38, 39, 822 P.2d 677, 678 (Ct. App. 1991)), *rev'd on other grounds*, 122 N.M. 187, 922 P.2d 569 (1996); Saiz v. Belen School District, 113 N.M. 387, 393, 827 P.2d 102, 108 (1992); Budagher v. Amrep Corp., 97 N.M. 116, 119, 637 P.2d 547, 550 (1981) (citing Srader v. Pecos Constr. Co., 71 N.M. 320, 378 P.2d 364 (1963); RESTATEMENT (SECOND) OF TORTS §§ 409-429 (1965)).

76. *See* Otero, 119 N.M. at 723, 895 P.2d at 245; *Budagher*, 97 N.M. at 119-21, 637 P.2d at 550-52 (citing *Srader*, 71 N.M. 320, 378 P.2d 364; RESTATEMENT (SECOND) OF TORTS §§ 409-429).

77. *See* RESTATEMENT (SECOND) OF TORTS § 409 cmt. b.

78. *See* N.M. STAT. ANN. § 41-3A-1(C)(2). Section 41-3A-1(C) provides in part:

> The doctrine imposing joint and several liability shall apply: . . .
>
> (2) to any persons whose relationship to each other would make one person vicariously liable for the acts of the other, but only to that portion of total liability attributed to those persons.

Id. § 41-3A-1(C).

79. *See Budagher*, 97 N.M. at 119-20, 637 P.2d at 550-51. (The *Budagher* court did not explicitly state what type of liability a landowner has for the negligence of an independent contractor—*i.e.*, whether it is direct or vicarious liability.)

80. *See id.* at 120, 637 P.2d at 551 (Landowners who hire independent contractors are liable for inherently dangerous conditions created upon their land.).

81. 113 N.M. 38, 822 P.2d 677 (Ct. App. 1991).

82. *See id.* at 41, 822 P.2d at 680; *see also* RESTATEMENT (SECOND) OF TORTS § 422(a) (1965) (entitled "Work on Buildings and Other Structures on Land"). Section 422 states:

> A possessor of land who entrusts to an independent contractor construction, repair, or other work on the land, or on a building or other structure upon it, is subject to the same liability as though he had retained the work in his own hands to others on or outside of the land for physical harm caused to them by the unsafe condition of the structure
>
> (a) while the possessor has retained possession of the land during the progress of the work .
>
> . . .

RESTATEMENT (SECOND) OF TORTS § 422.

83. *See Broome*, 113 N.M. at 41, 822 P.2d at 680. The commercial landowner's hired painter left a drop cloth on the floor which caused an employee of the landowner's tenant to trip and fall as she was leaving work. *See id.* at 39, 822 P.2d at 678.

84. *See* RESTATEMENT (SECOND) OF TORTS § 422(a).

85. *See Broome*, 113 N.M. at 41, 822 P.2d at 680.

liable for the unsafe condition created by the independent contractor during the construction as though the landowner had himself defectively performed the work.[86]

b. The Public Policy Exception to Several Liability.

The New Mexico Legislature adopted a public policy exception to several liability in section 41-3A-1(C)(4) of the New Mexico Several Liability Act.[87] The New Mexico Supreme Court first construed the above public policy exception in *Saiz v. Belen School District*.[88] In *Saiz*, the court specifically addressed "whether a [landowner's] nondelegable duty gives rise to direct strict liability [on the part of the landowner] for the absence of required precautions or whether [the landowner's nondelegable duty only] gives rise to vicarious liability [on the part of the landowner] for the negligence of the independent contractor."[89] The *Saiz* court held that the landowner in the case before it was directly and strictly liable for failing to take reasonable precautions to protect against a negligently constructed and maintained high voltage lighting system.[90] For its holding, the *Saiz* court relied on *Pendergrass v. Lovelace*[91] and *Budagher v. Amrep Corp.*,[92] both which indicated that an employer has a nondelegable duty to ensure that precautions are taken.[93] The *Saiz* court made no mention of *Broome v. Byrd* in its decision.

In *Saiz*, the test of liability was "the presence or absence of precautions that would be deemed reasonably necessary by one to whom knowledge of all circumstances is attributed."[94] Under *Saiz*, New Mexico holds landowners jointly and severally liable under the statutory public policy exception to several liability. As such, under *Saiz*, landowners are directly and strictly liable for their independent contractor's negligence when an inherent risk of harm is involved and the landowner has failed to take reasonable precautions to protect against such harm.[95]

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86. *See id.*

87. *See* N.M. STAT. ANN. § 41-3A-1(C)(4). Section 41-3A-1(C) provides in part:

> The doctrine imposing joint and several liability shall apply:
>
> (4) to situations . . . having a sound basis in public policy.

Id. § 41-3A-1(C).

88. 113 N.M. 387, 400, 827 P.2d 102, 115 (1992). "This [c]ourt has not had occasion to add to the express exceptions of the [several liability s]tatute under the public policy grounds of [s]ubsection [41-3A-1](C)(4). We do so today." *Id.* at 400, 827 P.2d at 115.

89. *Id.* at 394, 827 P.2d at 109.

90. *See Saiz*, 113 N.M. 387, 827 P.2d 102.

91. 57 N.M. 661, 262 P.2d 231 (1953) (holding that work that is intrinsically and inherently dangerous in performance is not delegable to escape liability).

92. 97 N.M. 116, 637 P.2d 547 (1981) (referring to several exceptions to the general rule of non-liability, including "peculiar risk" and "special danger").

93. *See Saiz*, 113 N.M. at 394-95, 827 P.2d at 109-10 (citing *Budagher*, 97 N.M. at 119-20, 637 P.2d at 550-51; *Pendergrass*, 57 N.M. at 663, 262 P.2d at 232).

94. *Saiz*, 113 N.M. at 395, 827 P.2d at 110.

95. *See id.* The phrase "reasonable precaution" could include maintaining a public walkway in such a condition so that it does not become slick. *See generally* Ford v. Board of County Comm'rs, 118 N.M. 134, 879 P.2d 766 (1994).

C. *The Adoption of Proportional Indemnification and Extension of Equitable Principles in New Mexico*

New Mexico adopted proportional indemnification in *Amrep Southwest, Inc. v. Shollenbarger Wood Treating, Inc.*[96] The *Amrep* court found that the equitable principles underlying New Mexico's adoption of comparative negligence mandated a right of proportional indemnity for defendants who could not raise the fault of concurrent tortfeasors as a defense because of the plaintiff's choice of remedy.[97] It therefore adopted proportional indemnification in order to establish an equitable system in which a defendant who is held fully liable may seek partial recovery from others who also are at fault.[98]

The *Amrep* court cautioned, however, that proportional indemnification applies in only limited circumstances.[99] Proportional indemnification does not apply when the factfinder makes a determination of liability under the doctrines of pure comparative negligence and several liability.[100] The court further warned that proportional indemnification applies only when contribution or some other form of proration of fault among tortfeasors is unavailable.[101]

IV. RATIONALE OF THE *OTERO* COURT

In *Otero*, the New Mexico Supreme Court did not address the New Mexico Court of Appeals' adoption in *Otero* of section 422(b) of the *Restatement (Second) of Torts*,[102] even though, with its adoption of section 422(b), the court of appeals expanded its earlier decision in *Broome*.[103] The court of appeals in *Otero* held the defendant landowner, Jordan, liable for harm occurring after the completion of the work by its independent contractor under section 422(b) to the same extent as if it had "[it]self defectively performed the work."[104] Under the court of appeals' analysis in *Otero*, if the City, a concurrent negligent tortfeasor, was found to have been liable in any way to Otero, Jordan would have been required to indemnify the City because

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96. 119 N.M. 542, 893 P.2d 438 (1995).
97. *See id.* at 552-54, 893 P.2d 448-50.
98. *See id.* at 552, 893 P.2d at 448.
99. *See id.*
100. *See id.*
101. *See id.* at 552-53, 893 P.2d at 448-49.
102. *See* Otero v. Jordan Restaurant Enters., 122 N.M. 187, 188, 922 P.2d 569, 570 (1996) ("Questions regarding the adoption of [s]ection 422(b) [of the RESTATEMENT (SECOND) OF TORTS] . . . are not before this [c]ourt.").
103. *See* Otero v. Jordan Restaurant Enters., 119 N.M. 721, 723, 895 P.2d 243, 245 (Ct. App. 1995), *rev'd on other grounds*, 122 N.M. 187, 922 P.2d 569, (1996); *see also* RESTATEMENT (SECOND) OF TORTS § 422(b) (1965). Section 422 states in part:

> A possessor of land who entrusts to an independent contractor construction, repair, or other work on the land, or on a building or other structure upon it, is subject to the same liability as though he had retained the work in his own hands to others on or outside of the land for physical harm caused to them by the unsafe condition of the structure
>
> . . .
>
> (b) after he has resumed possession of the land upon its completion.

Id. § 422.
104. *See Otero*, 119 N.M. at 724, 895 P.2d at 246.

Marquart, for whom Jordan was vicariously liable, would have had to indemnify the City.[105]

However, as previously noted, the supreme court in *Otero* limited its review to whether the City would have been entitled to indemnification from Jordan for any liability imposed on the City, and any effect that would have on comparative fault.[106] The supreme court narrowed the scope of its review in order to clarify that proportional indemnification does not apply when a plaintiff's theory provides a ready mechanism by which to apportion liability under the doctrine of comparative negligence.[107] Nonetheless, the supreme court affirmed the trial court's refusal of the proposed jury instruction which would have authorized the jury to compare the fault of the City to that of Marquart and reduce Jordan's vicarious liability for Marquart's tortious conduct.[108]

The supreme court rejected the court of appeals' conclusion that Jordan's failure to discover the defect in the bleachers was active negligence[109] because it was Marquart who failed to correctly assemble the bleachers.[110] The court found that because Jordan was not an active tortfeasor, it only was vicariously liable to Otero for Marquart's negligence.[111] As a result, Jordan did not stand in Marquart's shoes for the purposes of determining liability to the City for indemnification.[112] The supreme court concluded that proportional indemnification was not warranted and that the court of appeals' reliance on *Amrep Southwest, Inc. v. Shollenbarger Wood Treating, Inc.*,[113] for that proposition was misplaced.[114]

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105. *See id.* at 725-26, 895 P.2d at 247-48.

106. *See Otero*, 122 N.M. at 188, 922 P.2d at 570.

107. *See id.* at 190-91, 922 P.2d at 572-73. Otero sued in tort. Thus, his "theory of the case provide[d] a ready mechanism by which to fairly apportion liability for damages among all those at fault under the doctrine of comparative negligence." *Id.* As such, the court of appeals' conclusion that the City had a right to proportional indemnification from Otero was incorrect. *See id.*

108. *See id.* at 192, 922 P.2d at 574. According to the supreme court, it would have been contrary to public policy for it to allow Marquart to reduce his liability to Otero and profit from his "tacit representation" to the City that he did have a valid license when he knew that he did not. *See id.* at 192-93, 922 P.2d at 574-75.

109. *See id.* at 191, 922 P.2d at 573. The supreme court stated that the court of appeals was incorrect in making "[a]ny suggestion that the liability of a landowner to a business invitee for an unsafe condition created by [the landowner's independent] contractor and not discovered by the landowner arises by active negligence." *Id.*

110. *See id.* "Marquart's negligence in failing to correctly assemble the bleachers caused Otero's damages . . . . Jordan did not discover that the bleachers were unsafe. Hence, Jordan's liability [did] not arise from its active negligence, and[, thus, Jordan was] not . . . liable to indemnify concurrent tortfeasors[, such as the City]." *Id.* at 191-92, 922 P.2d at 573-74.

111. *See id.*

112. *See id.* at 193, 922 P.2d at 575.

113. 119 N.M. 542, 893 P.2d 438 (1995).

114. *See Otero*, 122 N.M. at 189-91, 922 P.2d at 571-73 (discussing Otero v. Jordan Restaurant Enters., 119 N.M. 721, 725-26, 895 P.2d 243, 247-48 (Ct. App. 1995), *rev'd*, 122 N.M. 187, 922 P.2d 569 (1996)). The court of appeals followed the analysis stemming from its adoption in *Otero* of the RESTATEMENT (SECOND) OF TORTS section 422(b) (1965). *See Otero*, 119 N.M. at 723-27, 895 P.2d at 245-49. The court of appeals analysis was as follows:

> (1) [Jordan was] liable for the defective bleachers to the same extent as the independent contractor[, Marquart,] would be liable; (2) under the circumstances of this case, the independent contractor[, Marquart,] and, therefore, [the d]efendant[, Jordan,] would be required to indemnify the City in the event the City were [sic] found to be liable at all to [the p]laintiff[, Otero]; and (3) therefore, [the p]laintiff should not be required to bring an action against the City, if [the p]laintiff elects instead to proceed directly against [the d]efendant for his damages.

Id.

In *Otero*, the supreme court stated that a landowner's liability for an unsafe condition on her premises does not arise from the landowner's active negligence when the condition is created by a contractor and not discovered by the landowner,[115] e.g., a latent defect. The supreme court found the defendant landowner, Jordan, to be vicariously responsible, rather than directly and strictly liable, to the plaintiff, Otero, for the unsafe condition on Jordan's premises created by the negligence of Marquart, the independent contractor hired by Jordan.[116] Jordan was vicariously liable to Otero because he "stood in the shoes" of Marquart for the purpose of determining liability to Otero.[117] However, the *Otero* court held that Jordan was *not* liable to indemnify concurrent tortfeasors, such as the City, because Jordan was not actively negligent,[118] and because "Jordan ha[d] no duty to the City" arising from Marquart's fraudulent permit application[119]—hence, Jordan did not "stand in the shoes" of Marquart for the purposes of determining liability to the City for indemnification. As a result, Jordan would not have been liable to indemnify the City had Otero chosen to sue the City.[120]

V. ANALYSIS OF *OTERO*

A. *Differing Standards of Liaibility*

In 1991, the New Mexico Court of Appeals in *Broome v. Byrd* held that a commercial landowner can be "*vicariously* liable for an independent contractor's negligence while the work is in progress and where the negligence created a dangerous condition causing injury to a business visitor in those areas of the building over which the [land]owner retains control."[121] In 1992, the New Mexico Supreme Court held in *Saiz v. Belen School District* that a landowner's nondelegable duty to ensure that reasonable precautions were taken to protect against physical harm to others gave rise to joint and several liability that was *direct*—not vicarious.[122] As a

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115. *See Otero*, 122 N.M. at 191, 922 P.2d at 573.

> Any suggestion that the liability of the [defendant] landowner to the plaintiff [under the circumstances at bar arose] from the active negligence of the landowner is incorrect . . . . Jordan's liability to Otero [arose] by operation of law because of a policy-based decision that landowners should be held responsible for unsafe conditions on their premises whether or not they directly created them.

Id.

116. "Jordan, as the owner of unsafe premises, [was] vicariously responsible to Otero for the entire liability of the independent contractor, Marquart." *Id.* at 192, 922 P.2d at 574. *But cf.* Saiz v. Belen Sch. Dist., 113 N.M. 387, 827 P.2d 102 (1992) (where liability of the landowner for failure to take reasonable precautions gave rise to joint and several liability under the section 41-3A-1(C)(4) public policy exception in New Mexico's Several Liability Act, rather than vicarious liability under the section 41-3A-1-(C)(2) exception to several liability in the Act). The supreme court's decision, while contrary to its earlier decision in *Saiz*, was in line with the court of appeals' earlier decision in *Broome*. *See* discussion *infra* Part V.

117. *See Otero*, 122 N.M. at 192-93, 922 P.2d at 574-75.

118. *See id.* at 191-92, 922 P.2d at 573-74.

119. *Id.* at 192, 922 P.2d at 574.

120. *See id.* at 193, 922 P.2d at 575.

121. Broome v. Byrd, 113 N.M. 38, 41, 822 P.2d 677, 680 (Ct. App. 1991) (emphasis added).

122. *See* Saiz v. Belen Sch. Dist., 113 N.M. 387, 395, 399-400, 827 P.2d 102, 110, 114-15 (1992). The *Saiz* court held the defendant landowner directly and strictly liable "for injuries caused by the absence of precautions required in the face of peculiar risks of harm created . . . in an area of public accommodation." *Id.* at 391, 827 P.2d at 106. The landowner's liability for a breach of a nondelegable duty was direct, not vicarious. *See id.* at 396, 827 P.2d

result of this nondelegable duty, the *Saiz* court held that an employer/landowner is directly and strictly liable for the negligence of a hired contractor if the employer/landowner did not take reasonable precautions against likely harm when an inherent risk of danger is involved.[123] Now, with *Otero*, in 1996, the supreme court has held that a landowner is *vicariously* liable,[124] despite its earlier rejection of "any coupling of the concept of vicarious liability and the nondelegable duty that landowners have."[125]

The supreme court's decision in *Otero* follows the New Mexico Court of Appeals' earlier adoption in *Broome* of section 422(a) of the *Restatement (Second) of Torts* and its holding that a landowner is vicariously liable for the negligence of an independent contractor while the work is in progress. The supreme court's extension in *Otero* of vicarious liability also is consistent with the understanding that the numerous exceptions to the non-imposition of liability on landowners for torts of their independent contractors make the imposition of liability likely to be applied in most cases. However, the *Otero* court's extension of vicarious liability deviates from the supreme court's 1992 decision in *Saiz v. Belen School District*, which held a landowner directly and strictly liable under the section 41-3A-1(C)(4) public policy exception of New Mexico's Several Liability Act.

B. Liability, Indemnification, and Comparative Fault in Otero

1. Liability

In *Otero*, Jordan, the landowner/employer, "stood in the shoes" of Marquart, its independent contractor, for the purpose of determining Jordan's liability to Otero, the victim and plaintiff, "because of a policy-based decision that landowners should be held responsible for unsafe conditions on their premises whether or not they directly created them."[126] Jordan was vicariously liable to Otero for Marquart's negligent construction of Jordan's bleachers.[127] Implicit in the supreme court's decision is that Jordan was jointly and severally liable with Marquart for Marquart's negligence because of Jordan's special relationship to Marquart, pursuant to section 41-3A-1(C)(2) of New Mexico's Several Liability Act.[128] Thus, under an *Otero* analysis, a landowner may anticipate being held vicariously liable for an independent

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at 111. The *Saiz* court further stated: "We reject any coupling of the concept of vicarious liability and nondelegable duty." *Id.* at 399, 827 P.2d at 114. This statement conflicts with the court of appeals' earlier findings in *Broome* that a commercial landowner has a nondelegable duty to business invitees with respect to repairs and other work on the landowner's premises, a duty which cannot be avoided by the hiring of an independent contractor, and that a landowner is vicariously liable for the negligence of a contractor. *See Broome*, 113 N.M. at 40-41, 822 P.2d 679-80.

123. *See Saiz*, 113 N.M. at 395, 827 P.2d at 110; *see also* Ford v. Board of County Comm'rs, 118 N.M. 134, 139, 879 P.2d 766, 771 (1994).

124. *See* Otero v. Jordan Restaurant Enters., 122 N.M. 187, 922 P.2d 569 (1996).

125. *Saiz*, 113 N.M. at 399, 827 P.2d at 114.

126. *Otero*, 122 N.M. at 191, 922 P.2d at 573.

127. *See id.* at 193, 922 P.2d at 575.

128. *See* N.M. STAT. ANN. § 41-3A-1 (Repl. Pamp. 1996). Any person whose relationship to another would make that person vicariously liable for the acts of the other shall be jointly and severally liable. *See id.* § 41-3A-1(C)(2).

contractor's tortious act rather than directly and strictly liable for the failure to take reasonable precautions to protect against harm on his premises.[129]

2. Indemnification

In *Otero*, the City negligently failed to investigate Marquart's permit application.[130] The City would have been entitled to indemnification from Marquart had Otero chosen to sue the City and had the City been assigned a percentage of fault based on its failure to investigate Marquart's application.[131] However, the supreme court found that Jordan would have had no duty to indemnify the City.[132]

The *Otero* court focused on Marquart's tacit and fraudulent representation to the City that he had a valid commercial license when he applied for a permit to make improvements on Jordan's restaurant.[133] Unlike Marquart, Jordan did not make an intentional misrepresentation to Otero or to the City.[134] Even if the City were held partially liable, Jordan was only a concurrent tortfeasor with the City rather than an intentional actor against the City.

Further, Jordan did not stand in Marquart's shoes to indemnify the City because Jordan owed no duty to the City. Marquart's misrepresentation that he had a license to perform commercial installations lay outside the scope of Jordan's duty. Jordan's duty extended only to business invitees.[135] The court reasoned that any complaint that the City, as a concurrent tortfeasor, might have for indemnification would have been only between the City and Marquart.[136] Thus, the *Otero* court found that Jordan would not have been required to indemnify the City had Otero sued the City and won.

3. Comparative Fault

Because Otero sued in tort, there was a ready mechanism by which to fairly apportion the liability of the City with that of Marquart and Jordan jointly and severally under the doctrine of comparative negligence. The supreme court would ordinarily have remanded this case for a determination of whether the City had breached its duty to investigate Marquart's permit application under principles of

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129. This in contrast to the supreme court's decision in *Saiz*, under which the nondelegable landowner duty would have given rise to joint and several liability under the section 41-3A-1(C)(4) public policy exception to several liability of the New Mexico Several Liability Act, and not to vicarious liability under section 41-3A-1(C)(2) of the Act.

130. *See Otero*, 122 N.M. at 189, 922 P.2d at 571.

131. *See id.* at 192, 922 P.2d at 574. The City would have been entitled to indemnification from Marquart for any damages awarded to Otero against it because of Marquart's fraudulent permit application. *See id.*

132. *See id.* at 193, 922 P.2d at 575.

133. *See id.* at 192, 922 P.2d at 574.

134. *See id.* at 191-92, 922 P.2d at 573-74. Of particular relevance to the court was Marquart's knowledge that he did not have a license to perform non-residential installations when Marquart made his application to the City. *See id.* at 192, 922 P.2d at 574.

135. *See id.* at 192-93, 922 P.2d at 574-75. Marquart, with his representation that he had a license to perform commercial installations, "could not have been allowed to attribute blame for Otero's injuries to the City." *Id.* at 192, 922 P.2d at 574.

136. The *Otero* court found that any complaint for indemnification by reason of Marquart's fraud against the City would be between the City and Marquart, not the City and Jordan. *See id.* at 193, 922 P.2d at 575.

comparative fault.[137] The factfinder could have determined the extent to which the City's alleged breach contributed to Otero's injuries. Then, the factfinder usually would have apportioned liability for damages between Marquart and the City under the doctrine of comparative fault.[138] It would have assigned Marquart's percentage of fault to Jordan who was found vicariously liable.[139]

However, the supreme court upheld the trial court's refusal of the comparative fault jury instruction because Marquart was guilty of the intentional tort of misrepresentation.[140] As discussed earlier,[141] intentional wrongdoers cannot reduce their liability by laying off fault on a negligent concurrent tortfeasor. Therefore, Jordan was not allowed to compare Marquart's fault with that of the City.[142]

Had the comparative fault jury instruction been given, Marquart could have benefited from his misrepresentation to the City by decreasing his liability for damages to Otero and his liability to indemnify Jordan by assigning some blame to the City. Under a *Saiz* analysis, Jordan would have been directly liable for the failure to take reasonable precautions under the section 43-3A-2(C)(4) public policy exception to several liability of the New Mexico Several Liability Act. Thus, Jordan would not have been entitled to indemnification from Marquart because his liability would be for his own failure to fulfill his nondelegable landowner's duty rather than vicariously for his contractor's negligence. Indeed, the *Saiz* court stated that "[l]iability is based upon a showing of injury proximately caused by the absence of the necessary precautions" by the landowner and that "[w]hat the independent contractor knew or should have known is not at issue."[143]

C. *Summary*

Strategically, Otero benefited from Marquart's intentional representation. Jordan also gained an advantage from being held vicariously liable rather than directly liable, because he then had a right to indemnification from Marquart. Unfortunately for Jordan, Marquart's representation barred the jury instruction which would have allowed the factfinder to compare the City's fault to Marquart's fault and thus to Jordan's vicarious liability for Marquart's conduct. Had the factfinder calculated the City's negligence into the award in this case, Otero would have borne the risk that the City's assigned portion of the liability would be uncollectible because of the City's possible immunity under the New Mexico Tort Claims Act.[144] However, the proposed jury instruction was refused because Marquart's "tacit representation" lay at the root of the City's alleged negligence.[145]

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137. *See id.* at 192, 922 P.2d at 574.
138. *See id.*
139. *See id.*
140. *See id.* at 192-93, 922 P.2d at 574-75.
141. *See* discussion *supra* Part III.A.
142. *See* N.M. STAT. ANN. § 41-3A-1(C)(1) (Repl. Pamp. 1996).
143. *See* Saiz v. Belen Sch. Dist., 113 N.M. 387, 399, 827 P.2d 102, 114 (1992).
144. *See* N.M. STAT. ANN. §§ 41-4-1 to 41-4-29 (Repl. Pamp. 1996).
145. *See Otero*, 122 N.M. at 192-93, 922 P.2d at 574-75.

VI. IMPLICATIONS OF THE *OTERO* DECISION

Otero v. Jordan Enterprises involved a "legal triangle." Jordan, rather than Otero, bore the burden of an insolvent or immune third party tortfeasor because Jordan was held jointly and severally liable with Marquart. The City's alleged negligence was never compared by the factfinder because Marquart's tacit representation barred comparing the fault of concurrent tortfeasors.

After *Otero*, landowners will attempt to analogize their situation to *Otero* so that they will be held vicariously liable, rather than directly liable, for the negligent conduct of independent contractors who leave the premises unsafe after they have completed their work.[146] This is a logical extension of the court of appeal's earlier adoption in *Broome* of *Restatement (Second) of Torts* section 422(a), which imposes liability on landowners for negligent conditions on the land caused by independent contractors while the contractors are still working on the land. It additionally is in accord with the understanding that the numerosity of the exceptions to the general rule of non-liability of landowners frustrates the application of the general rule.

As a result of the *Otero* decision, landowners may attempt to use *Otero* when they are vicariously liable for negligent tortfeasors. This is because *Otero*: (1) enables the defendant landowner to apply the comparative negligence doctrine; (2) extinguishes the landowner's liability to indemnify concurrent tortfeasors; and (3) gives landowner's a right of indemnification from tortfeasors for whom they are held vicariously liable. Plaintiffs will analogize to *Otero* when a landowner is vicariously liable for an intentional tortfeasor because doing so will bar the comparative negligence doctrine when third party tortfeasors are involved.

Landowners may be barred from raising comparative fault as a defense when the negligent individual for whom they are found vicariously liable also has committed an intentional tort. Nonetheless, this may be less harsh than the supreme court's previous holding in *Saiz* which would have held the landowner directly liable for the landowner's failure to fulfill its nondelegable duty.

However, the *Otero* decision leaves unclear the relevance and applicability of the *Saiz* doctrine of direct and strict liability for a landowner's failure to fulfill its nondelegable duty. The *Otero* court did not mention *Saiz*. It chose instead to rely implicitly on the court of appeals' earlier decision in *Broome*.[147] The New Mexico supreme court may need to decide whether *Saiz* will survive *Otero*, and if so, how *Saiz* and *Otero* should work together in future litigation.

After *Otero*, a landowner who is vicariously liable may only compare the fault of concurrent tortfeasors to the same extent as his independent contractor can. A

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146. In effect, the result in *Otero* follows the language of RESTATEMENT (SECOND) OF TORTS section 422(b) (1965), although the supreme court did not expressly affirm the court of appeals' adoption of section 422(b) in the court of appeals' decision in *Otero*. *See Otero*, 122 N.M. at 188, 922 P.2d at 570 (The supreme court stated that questions regarding the adoption of section 422(b) were not before the court.); *see also* RESTATEMENT (SECOND) OF TORTS § 422(b) (1965); Otero v. Jordan Restaurant Enters., 119 N.M. 721, 723-24, 895 P.2d 243, 245-46 (Ct. App. 1995), *rev'd on other grounds*, 122 N.M. 187, 922 P.2d 569 (1996).

147. *See Otero*, 122 N.M. at 193, 922 P.2d at 575. "Jordan ha[d] a landowner's duty that impose[d] vicarious liability to invitees injured by an unsafe condition on the premises." *Id.* The *Otero* court's failure to cite or discuss *Saiz* echoes the *Saiz* court's failure to mention *Broome*.

landowner cannot compare the fault of concurrent tortfeasors when the contractor cannot compare fault due to the contractor's own intentional misconduct.[148]

The *Otero* court's reasoning may apply to any vicarious liability and concurrent negligence fact pattern. Once vicarious liability for an intentional tortfeasor is established, a plaintiff may seek one hundred percent of the recovery from the intentional tortfeasor and the person vicariously liable for the intentional tortfeasor, without having to compare the fault of other negligent concurrent tortfeasors. It appears that the vicariously liable landowner may have a separate claim for indemnification from the tortfeasor for whose conduct she is held vicariously liable. Moreover, the vicariously liable landowner will not owe a duty to indemnify concurrent third party tortfeasors. As the *Otero* court noted, not all vicarious liability fact patterns will bar the defense of comparative fault. The test is whether the vicarious liability is predicated on intentional conduct.

VII. CONCLUSION

In *Otero*, the New Mexico Supreme Court held that a landowner was vicariously liable rather than directly and strictly liable for injuries that occurred on its premises and arose from the tortious conduct of an independent contractor. After *Otero*, a vicariously liable landowner has a claim for indemnification from the hired independent contractor under certain circumstances. Additionally, a vicariously liable landowner is protected from having to indemnify concurrent tortfeasors. However, when an independent contractor's tort is an intentional one, neither the contractor nor the vicariously liable landowner can reduce her liability by comparing the fault of a concurrent tortfeasor.

The *Otero* decision provides plaintiffs with a mechanism by which to avoid comparing the fault of immune or insolvent negligent concurrent tortfeasors and, potentially, to recover one hundred percent of their damages. At the same time it protects defendants by holding defendant landowners vicariously liable rather than directly liable. Thus, landowners are protected from indemnifying concurrent tortfeasors when there is a ready mechanism by which to apportion liability under the doctrine of comparative fault.

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148. Again, intentional tortfeasors are barred from comparing the fault of concurrent negligent tortfeasors.